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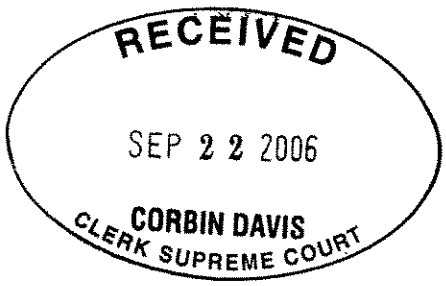
September 21, 2006



Corbin R. Davis
Clerk of the Supreme Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2005-19
Jury Reform Proposals
Proposed Amendment of MCR 2.512, 2.513, 2.514, 2.516 and 6.414

Dear Sir:

I have read the proposed amendments referred to above, and as a litigator and member of the bar who has practiced law in this state for over 47 years, I have some grave misgivings.

Over the years I have seen many changes in the way we do things – many of those for the better, quite obviously, but some, I fear, of the kind made simply for the sake of change and as a reflexive and ill-advised reaction to unfounded criticism. The latter of the two kinds, which I believe are present in the proposed amendments under consideration, give rise to my concerns, some of which are discussed below

In re subrule 2.513 (A)

In civil cases, preliminary instructions might well involve claims which had been pleaded as alternative theories and which are either voluntarily abandoned during the course of the trial, or do not otherwise survive at the close of the proofs. It therefore seems clear, I think, that preliminary instructions – particularly when written and placed in the jurors' hands – may in such cases put in the jurors' hands instructions on the elements of a cause of action which by the time the case goes to the jury is no longer in the mix. Therefore, I believe the proposed changes are improvident, would prove to be

unworkable and have the potential to lead to confusion and ultimately to an unjust result.

In re subrule 2.513 (D)

Frankly, I think the adoption of this subrule is an invitation to chaos. As proposed, it opens the door to mid-trial delays and distractions, and it will in all certainty provide an opportunity for some lawyers to deliberately create an appellate issue. Clearly, what the subrule terms "interim commentary" will inevitably be an argument of sorts, regardless of how carefully supervised, and the only "appropriate juncture" for argument to the jury is and should remain after they have heard all the evidence. As an aside, I think it fair to say that the perceived need by some for "interim commentary" can be traced directly to the fact that all too often cases are over litigated. If there is a problem in that regard, it is one that can solved through application of the rules as they now stand.

In re subrule 2.513 (E)

A notebook, if properly conceived and structured, may be worthwhile in some cases, but not as contemplated by the proposed subrule. An exhibit book is one thing, but a "notebook" which is to include witness lists – which often may name someone as a potential witness who for strategic reasons trial counsel decides not to call – statutory provisions, and other undefined materials carries the concept too far. It is not difficult to imagine that the trial court's resolution of disputes and differences over what the "notebook" should or should not contain will be another invitation to an appeal, which all too many will accept.

In re subrule 2.513 (F)

This proposal is unworkable. For example, in the event the parties cannot agree on a "concise written summary" of a deposition – and I am willing to bet that will be the case more often than not – how can the trial court be expected to determine what constitutes a fair, accurate and "concise written summary" without the court itself reading the deposition? And perhaps for the same reason reading several others, as well. And how long will it take to resolve those issues, and at what cost to the litigants? The jury should hear the witness' own words; a summary prepared by an advocate is hardly a proper substitute.

In re subrule 2.513 (G)

I believe the trial court already possesses the discretion to do what subsections (1) and (2) call for, and so it seems to me those are unnecessary. On the other hand, in my opinion, subsection (3) simply diminishes the trial process. Who is

to test the credibility of these "impaneled" experts, and by what method? How is the process to be controlled? What role does trial counsel play? If adopted, proposed subsection (3) will to lead to delays, to additional expense, and inevitably to error.

In re subrule 2.513 (H)

In my opinion, to allow jurors to take notes is one thing – and a "thing" of problematical value, at that; but to allow them to use the notes during their deliberations is yet another – and in my view an even more troubling "another." For example, to allow jurors to refer to their notes during their deliberations certainly gives rise to the possibility, if not likelihood, that their verdict may be the product of note taking rather a decision based on the evidence placed before them. From that it surely must follow that the notes must be preserved and open to review by counsel at least until the time for taking an appeal has elapsed. Moreover, in this context, one must ask whose notes are being considered and by whom? What about the notes of an alternate who is allowed to deliberate but is not in the final draw?

In re subrule 2.513 (I)

This, I think, is generally a waste of time. I believe that in most instances, a juror-submitted question is an invitation to error.

In re subrule 2.513 (J)

This subrule, in providing for a "jury view" of property or a specific place in appropriate cases, states that "[t]he parties are entitled to be present at the jury view." I assume that the attorneys – one per side – for the respective parties are included; but I think that, for sake of clarity, it might be well for that to be spelled out.

In re subrule 2.513 (K)

It would be naïve to think that jurors do not, at least on occasion, engage in discussions of their case during recesses; nevertheless, there is no good reason to encourage them to do so. It can only create problems. For example, what do we do about an alternate whose opinion, albeit prematurely given, is influential, and who later, when the final draw is made, is eliminated from the panel? In sum, too much discussion before the proofs are closed and the case in its entirety is in the hands of the jury can give rise to firmly placed and

erroneous conclusions which cannot be dislodged by the evidence or the arguments or the court's final instructions.

In re subrule 2.513 (M)

This subrule is completely at odds with our system. I believe that the trial judge is the personification of our system, and I think most jurors see things that way. Lawyers should, also. The courtroom is seen as the judge's courtroom, not the lawyers'. Surely, then, only the most naïve among us could ever believe that in the real world to allow the court to sum up the evidence and comment to the jury on the weight of the evidence would not unfairly sway the jury. Even though the trial judge attempts to adhere scrupulously to the letter of the subrule, to discharge the court's duties thereunder as fairly and impartially as humanly possible, the impact and effect of the court's words will be beyond the court's control. And, with all due respect to the proponents of the subrule, I believe that to think otherwise is only to fool ourselves.

In my view, the trial judge is and should remain the sole figure of authority in his or her court room – and in the eyes of the jurors and others present; the one person who speaks not for one litigant or another, but fairly and impartially for the system, fairly and impartially for the law. Things should remain that way. Our system works well when advocates do their jobs the right way and the trial judge runs a tight, well-ordered courtroom. To make a change such as this subrule would impose is uncalled for and will surely produce consequences never intended. For in reality, in its application, this subrule would more often than not transform a jury trial into a bench trial.

In re subrule 2.513 (N)

Subsection (3) makes it mandatory in all cases for the trial judge to provide each juror with a written copy of the court's final instructions. I believe that supplying each juror with a written copy of the court's final instructions is sound practice, but I do not think it is always a necessity. Therefore, I believe the decision whether to do so should remain a matter within the court's discretion.

In re subrule 2.513 (O)

Inasmuch as this subrule relates to materials to be allowed in the jury room when the jurors retire to deliberate, my comments with respect proposed subrules 2.513 (H) and (E) apply here as well.

Conclusion

Please accept and convey my thanks to all concerned for allowing me the opportunity to provide comments on the proposed changes.

Respectfully submitted,

PAUL A. TAGLIA

PAT/

cc: Hon. Paul L. Maloney
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